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Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL RAILROAD PASSENGER CORPORATION, *et al.*,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*
Respondents.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF CONCERNED RAILROADS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS BOSTON AND MAINE CORPORATION, ET AL.

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INTEREST OF THE *AMICI CURIAE*

This case is an appeal from decisions of the United States Court of Appeals for the District of Columbia Circuit that reversed and remanded a decision of the Interstate Commerce Commission ("ICC" or "Commission") that had approved the condemnation and conveyance by the National Railroad Passenger Corporation ("Amtrak") of a significant portion of an operating freight line ("Conn River Line") from one private railroad ("B&M") to another ("Central Vermont") under section 402(d) of the Rail Passenger Service Act of 1970 ("RPSA"), 45 U.S.C. § 562(d).[1] The *amici* railroads include most of the private freight railroads over which Amtrak operates nationwide.[2] They have a direct interest both in the authority of Amtrak to condemn the entire fee interest in an operating freight line and in Amtrak's use of that authority to force a conveyance of a line from one owner to another.

Amtrak operates largely over private rail lines, and its trains constitute a relatively small percentage of

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[1] *See* Pet. App. 1a-27a, 29a-109a, 139a-145a. References to "Pet. App." in this brief are to the appendix to the petition in No. 90-1419. References to "Gov't Pet." and "Amtrak Pet." are to the petitions in Nos. 90-1769 and 90-1419, respectively. References to "Gov't Br." and "Amtrak Br." are to those parties' briefs on the merits. References to "States Br." are to the brief on the merits of respondents State of Vermont and Commonwealth of Massachusetts.

[2] The *amici* railroads file this brief by consent of the parties, pursuant to Rule 37.3 of the Rules of this Court. The parties' letters of consent have been filed with the Clerk.

the traffic on those lines.[3] The railroads have cooperated with Amtrak to accommodate its passenger operations. Generally, Amtrak and the railroads have been ~~able~~ to reach voluntary agreements about the terms and conditions of operating rights ("trackage rights"). Where they have been unable to agree, the ICC has prescribed the necessary terms and conditions under section 402(a) of the RPSA, 45 U.S.C. § 562(a) (1988), which governs such disputes and provides standards for resolving compensation issues.[4] Until this case, Amtrak's condemnation authority under section 402(d) had never been used in a dispute about the terms and conditions of trackage rights, and, to the knowledge of the *amici* railroads, the suggestion had never been made that it could or should be so used, particularly as a device to transfer ownership of a rail line from one private freight railroad to another.[5]

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[3] The principal exception is the Northeast Corridor, which runs from Washington to Boston and carries over half of Amtrak's traffic nationwide. Amtrak owns the Northeast Corridor; several freight railroads also use the line under trackage rights agreements with Amtrak.

[4] Section 402(a)(1) addresses disputes concerning the terms and conditions of Amtrak's use of the railroads' lines; section 402(a)(2) addresses disputes concerning the railroads' use of Amtrak's lines.

[5] The only other time that Amtrak invoked section 402(d) was in 1986, after Consolidated Rail Corporation had filed a petition at the ICC to abandon a one-mile stretch of track in downtown Detroit. Amtrak and the City of Detroit had plans to relocate Amtrak's Detroit station to a site adjacent to the track, and Amtrak applied to condemn the track in order to preserve rail access to the site. Finance Docket No. 30898, *National R.R. Passenger Corp.—Conveyance of Conrail Line in Wayne County,*

The railroads' concern is not with the underlying dispute in this case but with the extreme statutory position that Amtrak and the federal petitioners have taken before this Court in order to avoid a remand to the ICC. Petitioners seek a determination that it does not matter whether Amtrak demonstrates, or the ICC finds, that condemnation of a railroad's operating rail line is, in the words of the statute, "required for intercity passenger rail service." Instead, they assert that section 402(d) gives Amtrak a largely unfettered choice to resolve a dispute about the terms and conditions of its trackage rights by forcing a sale of the entire fee interest in the line, through Amtrak, to the railroad's competitor.

The *amici* railroads submit this brief to demonstrate that no such interpretation of section 402(d) is appropriate or permissible.

SUMMARY OF ARGUMENT

Amtrak is not an agency or instrumentality of the federal government. Its eminent domain rights are entirely statutory and, as such, must be narrowly construed. This is particularly so in light of Congress' consistent denial of authority to the ICC to compel railroads to merge or sell their property against their will. *See St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 305-06 (1954). Ordinarily, the ICC is only empowered to approve *voluntary* conveyances of rail property between freight carriers. It may not force such conveyances. Even its authority to pre-

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MI (decided Sept. 29, 1986). Amtrak withdrew its application in that case when it received assurances that the track would remain available for passenger service. *See* Pet. App. 39a.

scribe more limited trackage rights is narrowly circumscribed. *See* 49 U.S.C. §§ 11103(a), 11125 (1988).

In this context, the proper interpretation of section 402 of the RPSA is clear. If Amtrak requires trackage rights over a railroad's line and is unable to reach agreement with the railroad on terms and conditions, the ICC's special prescription authority under section 402(a) provides a complete remedy. If Amtrak requires condemnation of a railroad's line and is unable to reach agreement with the railroad on terms and conditions for sale of its property, Amtrak may invoke the ICC's extraordinary condemnation powers under section 402(d).

The central issue in this case is whether, as a predicate to its invocation of section 402(d), Amtrak must affirmatively demonstrate, and the ICC must affirmatively find, that condemnation is "required for intercity passenger rail service." Amtrak asserted vigorously to the Commission that new ownership of B&M's segment of the Conn River Line was required if Amtrak's Montrealer service was to be reinstituted and successfully continued. But the ICC never made that finding. Instead, it held that the statute gave Amtrak a virtually unfettered choice of remedies in any dispute with a private freight railroad about the use of its track. So long as there was no significant interference with the railroad's ability to discharge its common carrier obligation, Amtrak could condemn the entire fee interest in the line and transfer it to another railroad more to Amtrak's liking.

The ICC's view of the statute cannot be reconciled with its plain language and intent. The ICC focused on the "need" presumption in the second half of section 402(d) and ignored the "required for intercity

passenger rail service" predicate in the first half. While the RPSA gives Amtrak considerable leeway to decide the best locations for its operations, Amtrak *is* required under section 402(d) to demonstrate, and the ICC *is* required to find, that a forced *sale* of a railroad's property is "required for intercity passenger rail service." If Amtrak's operational requirements can be met without recourse to the extraordinary remedy of condemnation, then section 402(d) cannot and should not be invoked. Assuming that Amtrak can successfully demonstrate that condemnation is required, if Amtrak further establishes that its presence will not interfere with a private freight railroad's common carrier obligation, then Amtrak is not further required under the "need" presumption of section 402(d) to look to alternative tracks or facilities to fulfill its needs.

This interpretation of section 402(d) is buttressed by the grave statutory and constitutional problems that are raised by petitioners' view of the statute. Petitioners acknowledge—indeed flaunt—that their interpretation would enable Amtrak to threaten railroads with loss of their property if they insist on their minimal compensation rights under section 402(a). The ICC went so far before the D.C. Circuit as to label Amtrak's brokering of its condemnation authority to Central Vermont as an "imaginative financing device." Pet. App. 15a. From the standpoint of statutory analysis, given that Amtrak was formed in significant part to halt the continued cross-subsidy of passenger service by the nation's railroads, which threatened to bankrupt the industry, Congress could not possibly have intended Amtrak to use section 402(d) to force carriers to provide service to Amtrak

below cost. Nor is it likely that Congress intended Amtrak to whipsaw the railroads by auctioning its condemnation authority to the highest bidder. Any such interpretation of the statute would collide not only with Congress' policy in the RPSA and the Interstate Commerce Act against the cross-subsidization of rail services, but also with Congress' policy in the Interstate Commerce Act against unnecessary regulatory interference in the business affairs of private rail carriers. *See General Am. Transp. Co. v. ICC*, 872 F.2d 1048, 1054-55 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1069 (1990).

From a constitutional standpoint, petitioners' interpretation would render the statute vulnerable to attack under both the non-delegation doctrine and the "public use requirement" of the Fifth Amendment. Under the Fifth Amendment, the government may condemn private property and transfer it to another owner only if necessary and to the extent required to achieve a "legitimate public purpose." *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). Amtrak purports to recognize this principle, but claims that the statute gives it unfettered authority to decide whether a taking is necessary and, if so, whether that taking will encompass a fee simple interest or a lesser interest. Under this theory, the statute delegates the powers of the sovereign to a self-interested private party, and denies the ICC any effective authority to review the exercise of that power. To delegate such unchecked authority would be highly suspect under the Constitution, and, for that reason alone, the statute should not be construed to make such a delegation. *Cf. Carter v. Carter Coal*, 298 U.S. 238, 310-12 (1936)

ARGUMENT

The ultimate question in this case is whether Amtrak must demonstrate, and the ICC must find, that condemnation of a railroad's line is "required for intercity passenger service" before Amtrak may take that property and transfer it to another rail carrier under section 402(d) of the RPSA. Not only the plain language of the statute, but also basic canons of statutory construction require an affirmative answer to this question. As explained in Part A below, petitioners' contrary interpretation violates the precept that statutes conferring eminent domain powers are in derogation of common law property rights and should be narrowly construed. *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983). As explained in Part B, petitioners' contrary interpretation does not meet the requirements that individual provisions of a statute be interpreted so that they all have meaning, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955), and that closely related statutes such as the RPSA and the Interstate Commerce Act be construed harmoniously, especially where they embody a common objective such as the elimination of cross-subsidies. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Finally, Part C demonstrates that petitioners' contrary interpretation violates the well-established principle that statutes should be construed so as to avoid constitutional issues. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980).[8]

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[8] Petitioners attempt to avoid these principles by invoking *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,

A. Amtrak's Condemnation Authority Must Be Strictly Construed; Petitioners' Interpretation Of Section 402(d) Of The RPSA Cannot Be Reconciled With Its Plain Language And Intent

Because the power of eminent domain derogates common-law property rights, any statute granting such power must be strictly interpreted against the condemning party and in favor of the owner of the property sought to be condemned. *See* N. Singer, 3 *Sutherland on Statutory Construction* § 64.06 (4th ed. 1986); *see also Norfolk Redevelopment & Housing Auth.*, 464 U.S. at 35-36 (common-law property rights may not be deemed repealed except by "clear and explicit" statutory language); *Western Union Tel. Co. v. Pennsylvania R.R.*, 195 U.S. 540, 569 (1904) (strict

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467 U.S. 838, 842-45 (1984), and arguing for deference to the ICC's interpretation of section 402(d). Gov't Br. 16-18; Amtrak Br. 21-22, 37. Yet *Chevron* itself endorses continued use of the "traditional tools of statutory construction." *Id.* at 843 n.11. This is especially appropriate here, since the ICC never addressed the meaning of "required for intercity passenger rail service." Whatever deference might be due a reasoned interpretation of that language, the Court need not defer to a non-interpretation. Deference is particularly inappropriate here because, although the agency's interpretation raises serious constitutional questions, the ICC has admitted that it has no expertise or authority to decide constitutional issues. Pet. App. 44a.

Chevron poses no other barriers to this Court's undertaking an interpretation of the statute. This Court need not decide what quantum of evidence will meet the "required for intercity passenger rail service" test in order to find that it is patently unreasonable for the ICC either to ignore the test altogether or implicitly to read "required" out of the statute. *See Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987); *see also* C. Sunstein, "Law and Administration After *Chevron*," 90 *Colum. L. Rev.* 2071, 2105-15 (1990).

construction required because eminent domain "subverts the usual attributes of the ownership of property"). Where a private or quasi-public entity seeks to exercise eminent domain power, this rule is coupled with the requirement that grants of power to corporations be narrowly construed. *See Sutherland on Statutory Construction, supra*; *see also United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946) (utility's power of eminent domain limited to powers "expressed or necessarily implied").

Amtrak is *not* an "agency, instrumentality, authority, or entity, or establishment of the United States Government." 45 U.S.C. § 541 (1988). It is a common carrier subject both to the provisions and policies of the RPSA and to those of the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (1988), unless expressly excepted. 45 U.S.C. § 546(a) (1988). It has no condemnation power except that provided by statute, and that power must be strictly construed to encompass only what the statute confers. *See National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264-65 & n.3 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987) (construing Amtrak's authority to condemn non-rail property).

Amtrak's power to condemn rail property requires particularly close construction. Railroads must invest enormous amounts of private capital in track, roadbed, and equipment in order to provide freight service, and Congress has "consistently and insistently" denied the ICC the authority to compel railroads to merge or to sell their property against their will. *St. Joe Paper*, 347 U.S. at 305-06; *see also Illinois Cent. R.R. v. United States*, 263 F. Supp. 421, 435 (N.D.

Ill. 1966), *aff'd*, 385 U.S. 457 (1967) (per curiam). The ICC's role has been to approve or to disapprove mergers or sales of property by one carrier to another which have been *voluntarily* agreed to by the railroads involved. 49 U.S.C. § 11343 (1988). Even in the more limited area of trackage rights, the ICC's authority under the Interstate Commerce Act to order one carrier to permit another to operate over its tracks is quite limited. Only in emergencies or within terminal areas may the ICC impose involuntary trackage rights arrangements on a carrier. 49 U.S.C. §§ 11103(a), 11125.[7] *See Magner-O'Hara Scenic Ry. v. ICC*, 692 F.2d 441, 445 (6th Cir. 1982); *Boston & Me. Corp. Trackage Rights over Conrail*, 360 I.C.C. 239, 241 (1979).

In this context, the powers granted Amtrak under section 402 of the RPSA, even as narrowly construed, are truly exceptional. If Amtrak is unable to reach voluntary agreement with a railroad regarding the use of its track and other facilities and the provision of services, Amtrak, under section 402(a), may obtain

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[7] The Commission will not impose involuntary trackage rights on a carrier under 49 U.S.C. § 11103(a) (1988) even within a terminal area except as "a remedy of last resort," where no less intrusive remedy is adequate "to remedy or prevent anticompetitive conduct on the part of the carrier." *Shenango, Inc. v. Pittsburgh, C. & Y. Ry.*, 5 I.C.C.2d 995, 1000-02 (1989). As the Commission stated in that case:

> [The owner of terminal facilities] has invested in and owns these facilities, and depriving it of the right to use them without good cause would undermine the incentive for private investment and ownership of the rail system contrary to the national transportation policy [49 U.S.C. § 10101a (1988)].

Id. at 1002.

a prompt order from the ICC requiring the railroad to provide trackage rights and setting the terms and conditions. Amtrak may be required to pay as little as the avoidable cost of its use of the track and the services it receives.[8] Further, under section 402(e)-(g), 45 U.S.C. § 562(e)-(g) (1988), insofar as it is practicable and Amtrak is prepared to cover the cost "pursuant to an agreement" or as "determined by the Commission in a proceeding pursuant to subsection (a)," Amtrak's passenger trains must be accorded preference over the owner's freight trains, must be permitted to operate at accelerated speeds, and must be permitted to operate on the schedule preferred by Amtrak.

By and large, since 1970, Amtrak and the freight railroads have succeeded in reaching voluntary agreements regarding Amtrak's operations over their lines. Where they have not, Amtrak has not hesitated to invoke its powers under section 402(a) to have the ICC order that the necessary trackage rights services

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[8] *See, e.g.*, Finance Docket No. 30426, *National Rail Passenger Corp. Application Under Section 402(a) of the Rail Passenger Serv. Act* (decided July 5, 1985) at 3, *aff'd sub nom. Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287 (2d Cir. 1986); *see also* H.R. Rep. No. 415, 93d Cong., 1st Sess. 11 (1973) (term "incremental" in section 402(a)(1) is equivalent to "avoidable").

In contrast to the avoidable cost standard under section 402(a)(1) for Amtrak's use of the railroads' lines, under section 402(a)(2) a freight railroad using Amtrak's lines must pay not only the avoidable costs of its use but also "a proportionate share of all other costs of providing services covered by this paragraph that are incurred for the common benefit of [Amtrak] and such freight railroad." 45 U.S.C. § 562(a)(2); *see also Costing Methodologies for the N.E. Corridor: Commuter Serv.*, 367 I.C.C. 192 (1983).

be provided.[9] The issue here, given Congress' obvious intent that section 402(a) govern disputes about trackage rights and Congress' strong policy against forced sales of rail lines, is whether Congress intended Amtrak's condemnation authority under section 402(d) to be interpreted to provide Amtrak virtually unbridled discretion to resolve a trackage rights dispute by forcing the owner of the line to convey its property to a competitor willing to offer Amtrak better terms.

The statutory interpretation issue is framed by the first few lines of section 402(d)(1):

> If [Amtrak] and a railroad are unable to agree upon terms for the sale to [Amtrak] of property, including interests in property . . . *owned by the railroad and required for intercity rail passenger service*, [Amtrak] may apply to the Commission for an order *establishing the need of [Amtrak] for the property at issue* . . . .

45 U.S.C. § 562(d) (emphasis added). The section goes on to establish a presumption that Amtrak's "need" for the property at issue is established unless the condemnation will "significantly impair" the railroad's ability to discharge its common carrier obligation *and* suitable alternative property is "available for sale on reasonable terms" to Amtrak or can be obtained by use of Amtrak's authority to condemn non-rail property. *Id.*

Only if the proposition is established that condemnation is "required for intercity passenger rail service," did Congress intend by this "need" presumption

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[9] *See* States Br. 26 n.20 (listing representative cases).

to limit any second-guessing by the freight railroad or the ICC about whether Amtrak had chosen the most appropriate property to condemn; detailed scrutiny would be necessary only where the original owner presents evidence showing that the taking would impair its ability to meet its common carrier obligation. Absent such a showing, the ICC need not investigate whether alternative property is available.[10]

Petitioners argue that the "needs" test stands by itself and that its satisfaction begins and ends the ICC's inquiry. Under their theory, Amtrak can condemn the fee interest in a rail line and transfer it to a new owner willing to pay for the privilege simply by making arrangements for a railroad that has lost its property to obtain limited trackage rights from the new owner. And what of the statutory predicate that the property to be condemned be "required for intercity passenger rail service?" Petitioners argue that this language really does not mean what it says. They suggest that "required for" be read out of the statute in favor of "useful" or "in connection with." Gov't Br. 17; Amtrak Br. 30 n.20.

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[10] This reading of the "need" presumption is consistent with the ICC's reading of the "necessary to carry out the purposes of this Act" standard by which the ICC determines, under section 402(a)(1), whether Amtrak's request for the prescription of trackage rights over a particular line is justified. *See, e.g.*, Finance Docket No. 31895, *National R.R. Passenger Corp.—Section 402(a) of the Rail Passenger Serv. Act—Order to Require Serv. & Set Compensation Terms* (decided June 19, 1991) (refusing to "second-guess, or substitute our judgment for, Amtrak's business judgment" in deciding to operate particular trains over particular routes); Finance Docket No. 31306, *Amtrak & Wisconsin Cent. Ltd.—Use of Tracks & Facilities & Establishing Just Compensation* (decided July 29, 1988) (same).

Amtrak's strained construction of "required for intercity passenger rail service" is belied by its own opening position in the agency's proceedings. From the outset, Amtrak claimed that it had been "compelled to discontinue" its Montrealer service and it requested "that the Commission institute a proceeding under section 402(d) for the forced conveyance of this line to it so that passenger service may be resumed over the line." Pet. App. 122a. When B&M filed a petition to convert Amtrak's application for condemnation under section 402(d) to an application for prescribed trackage rights and services under section 402(a), the ICC rejected that petition on the ground that "Amtrak's position clearly is that only when the subject line belongs to a party other than B&M will the line be available for prompt upgrading, permitting restoration of reliable and economical passenger service." Pet. App. 116a. Even the Commission's final decision in the case began with a recitation of Amtrak's claim in this "extraordinary proceeding" that "it has exhausted all alternatives to condemnation and has found it necessary to resort to the condemnation powers under § 402(d) in this case." Pet. App. 39a.

In short, both Amtrak and the Commission clearly recognized the importance of establishing, as a predicate for Amtrak's section 402(d) application, that condemnation of B&M's property was *required for*—not related to or convenient for—intercity passenger rail service. But the ICC never came to grips with its obligation actually to weigh the evidence and make that finding *itself*. The closest the ICC even came to addressing the point was the following cryptic com-

ment in response to B&M's argument that divesting B&M of ownership was not required:

> [S]ince § 402(a) provides for trackage rights, § 402(d) must have been intended to provide more. We find that Amtrak has demonstrated sufficient reason to justify acquisition of ownership of the line. We find no abuse of § 402(d) processes here.

Pet. App. 43a.

The D.C. Circuit found, unanimously, that this was not enough and so should this Court.[11] We will have more to say below about "abuse" of section 402(d) processes. The point here is that the statute itself contains an express barrier to any abuse. If the ICC *weighs the evidence* and makes a *reasoned finding* that condemnation of a railroad's operating freight line is "required for intercity passenger rail service," then and only then may it proceed to assess whether Amtrak's need for that particular line should be deemed established.

Petitioners suggest that this reading of "required for intercity passenger rail service" would make the "need" determination redundant. Gov't Br. 20; Amtrak Br. 21. There is no such redundancy. The RPSA gives Amtrak considerable leeway to decide where and how to operate. *See* note 10, *supra*. The "need" presumption in section 402(d) reflects that policy of

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[11] While the majority and concurring opinions below differed in their reading of the findings required under the "need" presumption of section 402(d), they were unanimous that the ICC must find that condemnation is "required for intercity passenger rail service" before even reaching the "need" presumption. Pet. App. 3a-4a, 18a, 25a-26a.

not second-guessing Amtrak's business judgment about the best locations for its operations, absent exceptional circumstances. But that deference need not and does not extend to Amtrak's choices between condemnation and less intrusive means of meeting its presumed needs. Condemnation of the entire fee interest in an operating freight line is a far cry from trackage rights for a limited number of passenger trains. Nothing in the "need" presumption absolves the ICC of its responsibility to determine that condemnation of the entire property interest Amtrak says it needs is "required for intercity passenger rail service."

By the same token, nothing in Congress' 1990 amendment to section 402(d) eliminates the statutory predicate that any property condemned be "required for intercity passenger rail service." That amendment makes clear that *if* the criteria of section 402(d) are otherwise met, Amtrak "may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act." *See* Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658. This amendment was apparently prompted by congressional concerns that the D.C. Circuit's first decision in this case absolutely foreclosed Amtrak from ever condemning an operating freight line in contemplation of reconveying that line to a third party.[12] On rehearing, the court

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[12] There were no hearings and there are no committee reports regarding the amendment. The only congressional commentary is a statement read into the record on the Senate floor on behalf of Senator Jeffords of Vermont. It makes clear that Senator Jeffords was extremely concerned about the Montrealer service

of appeals certainly recognized that condemnation followed by a reconveyance was permissible in appropriate circumstances. As the court made clear, however, the amendment did not affect its original determination that the ICC had failed to make the findings required by section 402(d) as the predicates to approving condemnation in the first place.

B. Petitioners' Interpretation Of Section 402(d) Would Violate Strong Congressional Policies Against Cross-Subsidization Of Rail Services And Against Unnecessary Regulatory Interference In Business Relations Between Rail Carriers

The D.C. Circuit's strict construction of section 402(d) was influenced by its concern that Amtrak's construction would promote cross-subsidization of rail services and the brokering of Amtrak's condemnation rights, contrary to Congress' intent. Pet. App. 14a-15a, 17a-18a, 22a-23a. The court's concern was well-founded. Amtrak is not a freight railroad, and it is not authorized to provide freight service. 45 U.S.C. §§ 541, 545(a) (1988). Condemning an operating freight line and transferring it to another private freight railroad, unless "required for intercity passenger rail service," creates an open conflict with the policies and

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and desired to overturn the D.C. Circuit's decision insofar as the court held that Amtrak had no authority to condemn rail property with the intention of reconveying the property. 136 Cong. Rec. S17668 (daily ed. Oct. 27, 1990). The amendment accomplishes that purpose by permitting reconveyance when the other statutory standards are met. The ICC still has the responsibility, however, to determine that condemnation is "required for intercity passenger rail service" and, if so, that the "need" presumption applies. In addition, under the amendment, the ICC must find that Amtrak's particular reconveyance plans "further the purposes of [the RPSA]."

procedures of the Interstate Commerce Act, which petitioners cannot explain away.

As noted earlier, Congress has consistently denied the ICC authority to require one railroad to sell its property to another against its will. Thus, all of the procedures in the Interstate Commerce Act for ICC review of inter-carrier transfers assume *voluntary* agreements between the carriers about the terms and conditions of the transaction.[13] The ICC *never* sets the price for the sale of the fee interest in an operating rail line from one freight railroad to another.[14] If the railroads are unable to reach agreement on a

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[13] Congress' policy against unnecessary regulatory interference in the business relations of railroads is even stronger today than in years past. In the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ("4-R Act"), and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 ("Staggers Act"), Congress extensively amended the Interstate Commerce Act in order to free the railroads from unnecessary and counterproductive government regulation. *See* Staggers Act, § 2 (Congressional Declaration of Findings) ("(3) today, most transportation within the United States is competitive; (4) many of the Government regulations affecting railroads have become unnecessary and inefficient; . . . (9) modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential. . . ."); 49 U.S.C. § 10101a(2) (requiring the ICC to "minimize the need for Federal regulatory control over the rail transportation system"); 49 U.S.C. § 10505 (1988) (giving the ICC broad authority and duty to exempt rail matters from regulation); H.R. Rep. No. 1430, 96th Cong., 2d Sess. 89, *reprinted in* 1980 U.S. Code Cong. & Admin. News 3978, 4120; S. Rep. No. 499, 94th Cong., 2d Sess. 10-11, *reprinted in* 1976 U.S. Code Cong. & Admin. News 14, 23-25.

[14] *Cf.* 49 U.S.C. §§ 10905, 10910 (1988) (providing procedures for persons to subsidize or purchase a line in the context of abandonment or discontinuance of rail service).

fair price, there is no sale. Just as any other private business, a railroad is not required to relinquish control of its assets to a competitor unless the parties agree to a mutually advantageous price.

In this case, Central Vermont made an offer to buy B&M's segment of the Conn River Line, which B&M rejected. Pet. App. 131a. The acquisition of that segment would give Central Vermont control of the entire line, which B&M deemed both a competitive threat and a valuable right. Presumably, condemnation of B&M's line would not have been necessary if Central Vermont had been willing to pay B&M what B&M considered a fair price for control of the line. The ICC would have exempted such a voluntary transaction from review under the Interstate Commerce Act, *see* 49 U.S.C. § 10505; Pet. App. 81a-85a, and Amtrak could then have had the trackage rights it says it wanted with Central Vermont.[15]

What troubled the D.C. Circuit, and what troubles the *amici* railroads, about requiring B&M to sell its segment of the Conn River Line to Central Vermont for "just compensation" is that that amount was obviously less than B&M thought the property was worth and may well have been less than Central Vermont was willing to pay in an arms' length transaction.[16] By brokering its condemnation authority to

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[15] Of course, Central Vermont might not have been willing to make the same arrangement with Amtrak if Central Vermont had had to pay a market-based price to B&M. In that case, however, Amtrak would always have had recourse to section 402(a) to obtain trackage rights for as little as the avoidable cost of its operations.

[16] Although "just compensation" is frequently equated with

Central Vermont, Amtrak is in a position to receive trackage rights from Central Vermont on better terms than it could have obtained from either Central Vermont or B&M under normal RPSA and Interstate Commerce Act procedures. Furthermore, if the Court determines that the statute permits Amtrak to engage in such brokering anytime it decides it "needs" a line—*i.e.*, regardless of whether condemnation is *required* for intercity passenger rail service—then Amtrak will be in a position to obtain better terms than it could obtain under section 402(a) without even going through condemnation procedures. Any time Amtrak and a railroad might disagree about the costs of Amtrak's operations, Amtrak could threaten to bypass the procedures of section 402(a) and use section 402(d) to condemn the line and reconvey it to one of the railroad's competitors.

The Court does not need to speculate about Amtrak's willingness to use such a threat. Petitioners have already argued to the Court that they believe Amtrak needs a loose reading of section 402(d) in order to give it "leverage" over the freight carriers. Gov't Pet. 27; Amtrak Pet. 27-28. Since Amtrak already has "leverage" under section 402(a) promptly to obtain operating rights for as little as the avoidable cost of its operations, petitioners can only be sug-

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market value, in fact it typically does not reflect the value of the property on the open market, but only the "loss" to the owner. *See United States v. Miller*, 317 U.S. 369, 375 (1943). It is precisely because the value to the taker is excluded altogether from the "just compensation" calculation that private entities are motivated to seek eminent domain rights. *See generally* R. Epstein, *Takings—Private Property and the Power of Eminent Domain* 162-66 (1985); T. Merrill, "The Economics of Public Use," 72 *Cornell L. Rev.* 61, 85-88 (1986).

gesting that Amtrak requires "leverage" to obtain operating rights below cost.

The D.C. Circuit quite properly recognized that permitting Amtrak to use the threat of condemnation to pressure railroads into providing services to Amtrak at no cost or below cost would openly conflict with Congress' strong policy against cross-subsidization. It also recognized that allowing Amtrak to broker its condemnation powers would result in another form of cross-subsidy, since Amtrak would be in a position to extract, in the D.C. Circuit's words, at least part of the "premium" that Central Vermont might otherwise have paid for control of the line. Pet. App. 22a-23a.

Petitioners' suggestion that the RPSA embodies no policy against cross-subsidization, Gov't Br. 21 n.16; Amtrak Br. 23, is wrong. The RPSA was passed in substantial part to divorce passenger operations from freight operations because Congress recognized that passenger services could not continue to be subsidized by freight railroads,[17] and section 402(a) expressly imposes an incremental cost standard to prevent freight railroads from being required to cross-subsidize Amtrak's passenger operations, *see* note 8, *supra*. In any event, there is no debate that the Interstate Commerce Act contains a strong policy against cross-subsidization, which is applicable both to Amtrak, 45 U.S.C. § 546(a), and to the freight railroads, 49 U.S.C.

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[17] *See* H.R. Rep. No. 1580, 91st Cong., 2d Sess. 1-4, *reprinted in* 1970 U.S. Code Cong. & Admin. News 4735, 4735-38; *see also* H.R. Rep. No. 1182, 95th Cong., 2d Sess. 6-9, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2313, 2314-16.

§ 10501(a) (1988). *See generally General Am. Transp. Corp. v. Indiana Harbor Belt R.R.*, 3 I.C.C.2d 599, 606-11 (1987), *aff'd sub nom. General Am. Transp. Corp. v. ICC*, 872 F.2d 1048, 1054-55 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1069 (1990) (reviewing 4-R and Staggers Act provisions and legislative history mandating the elimination of noncompensatory rates and discouraging cross-subsidization between rail services and between railroads); *Illinois v. ICC*, 722 F.2d 1341, 1347-48 (7th Cir. 1983) (same).

There is also no debate that the Interstate Commerce Act embodies a strong policy against unnecessary regulatory interference with inter-carrier business dealings.[18] There is no regulatory interference with a private railroad's business more intrusive than condemnation—particularly when a railroad's property is condemned for the use of its competitor—and there is no greater cause for judicial concern that the policies and procedures of the Interstate Commerce Act are not sacrificed unnecessarily. Given that the policies and procedures of the RPSA and the Interstate Commerce Act can be harmonized by giving the "required for intercity passenger rail service" predicate of section 402(d) its logical meaning, there is no basis for adopting petitioners' strained interpretation. *See generally Morton v. Mancari*, 417 U.S. at 551.

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[18] Any doubt in that regard was laid to rest by Congress' passage of the 4-R and Staggers Acts. *See* note 13, *supra; see also Pittsburgh & L. E. R.R. v. RLEA*, 491 U.S. 490, 510-11 (1989); *ICC v. Texas*, 479 U.S. 450, 459-61 (1987).

C. Petitioners' Interpretation of Section 402(d) Would Create Serious Constitutional Problems

A basic rule of statutory construction is that a statute should be construed so as to avoid constitutional infirmities. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988); *Industrial Union Dep't*, 448 U.S. at 646. The corollary to this rule is that " '[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.' " *Rust v. Sullivan*, 500 U.S. ___, 111 S. Ct. 1759, 1771 (1991) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916)).

The court of appeals interpreted section 402(d) in accordance with these principles. Pet. App. 21a. Petitioners now argue that the court's constitutional concerns are "illusory," Gov't Br. 23 n.19; Amtrak Br. 42-43, but they continue to assert that the statute gives Amtrak sole authority to determine whether a taking of rail property is "required for intercity rail passenger service." Gov't Br. 17; Amtrak Br. 28, 30 n.20. They also claim that it is solely within Amtrak's discretion to choose between condemnation of a fee simple interest under section 402(d) and other less intrusive remedies. Gov't Br. 14; Amtrak Br. 19.

Two separate lines of constitutional authority converge here to preclude petitioners' interpretation. First, the Constitution prohibits the delegation of regulatory authority to private businesses or associations. This Court has twice invalidated federal legislation granting governmental authority to private parties. *Carter*, 298 U.S. at 310-12 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-42

(1935). The Court held that delegation of coercive authority to private parties is "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter*, 298 U.S. at 311. "[I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor." *Id.*; *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143-44 (D.C. Cir. 1984).[19]

Second, the Fifth Amendment allows property to be taken only for a "public use." U.S. Const. amend. V; *Hawaii Housing Auth.*, 467 U.S. at 241 (citing, *inter alia*, *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)); *Cincinnati v. Vester*, 281 U.S. 439, 447 (1930). A "purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government

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[19] This Court has condemned private policy-making in a variety of other contexts as well. *See Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) (striking down a zoning ordinance under the Due Process Clause of the Fourteenth Amendment on the ground that it conferred the government's authority on private interests); *Eubank v. Richmond*, 226 U.S. 137 (1912); *see also United States v. Mazurie*, 419 U.S. 544, 557 (1975) (upholding a delegation to Indian tribes of authority to regulate liquor sales on Indian lands, emphasizing that Indian tribes "are unique aggregations possessing attributes of sovereignty over both their members and their territory" and therefore "are a good deal more than 'private voluntary organizations' "); L. Tribe, *American Constitutional Law* § 5-17, at 369 (2d ed. 1988).

and would thus be void." *Hawaii Housing Auth.*, 467 U.S. at 245.[20]

Petitioners' interpretation of section 402(d) runs squarely into both of these rules. It would delegate to Amtrak the authority to take property already dedicated to rail service and transfer it to a competitor of the original owner even if the taking does not serve a "legitimate public purpose." Of course, when a *government agency* is authorized to exercise the power of eminent domain, its decisions to take specific parcels of land are assumed to serve the "public purpose" identified in the applicable statute, and the judicial role in individual cases is limited. *See Berman v. Parker*, 348 U.S. 26, 33-36 (1954); *United States ex rel. Tennessee Valley Auth. v. Welch*, 327 U.S. 546,

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[20] Prior to the decision in *Carter*, 281 U.S. at 311, this Court held that Congress could grant eminent domain power to private corporations. *See Luxton v. North River Bridge Co.*, 153 U.S. 525 (1894); *Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641 (1890). In the statutes initially examined by this Court, however, Congress itself identified the property to be taken in precise geographic terms and specified the public uses necessary for the property. In addition, private corporations that were granted eminent domain powers generally were prohibited from delegating that authority to other entities. *Western Union Tel. Co. v. Pennsylvania R.R.*, 195 U.S. 594, 598, 600 (1904). Congress later granted broader condemnation powers to a limited number of highly regulated public utilities, but provided for detailed review by a federal agency. Such utilities were typically required to obtain a federal certificate of public convenience and necessity for the project in question. *See Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644, 646 (5th Cir. 1950). To our knowledge, this Court has never considered the constitutional implications of a federal statute allowing a private corporation to exercise virtually unfettered power of eminent domain on behalf of other private corporations.

551-53 (1946). Where the legislature authorizes a *private corporation* to exercise the power of eminent domain, however, compliance with the "public use" requirement must be reviewed more carefully by the responsible agency and the courts. *See United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 681 (1896); *Two Parcels of Land*, 822 F.2d at 1265; *Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement*, 688 F. Supp. 1245, 1249 (N.D. Ohio 1988) (citing *United States v. Certain Parcels of Land*, 215 F.2d 140, 148 (3d Cir. 1954)). Private corporations such as Amtrak may not exercise independent regulatory authority, let alone an essentially unchecked power of eminent domain. At the very least, the decisions of such corporations must be subject to especially careful administrative and judicial review.

In essence, it is the adequacy of the agency's oversight that is at issue in this case. Section 402(d) of the RPSA provides that if certain requirements are satisfied, Amtrak may condemn private property already dedicated to rail service and then convey that property to a competitor of the original owner. Under this extraordinary provision, it is especially critical that the ICC and, if necessary, the courts, ensure that the initial taking is required in order to achieve a "legitimate purpose of government." *Hawaii Housing Auth.*, 467 U.S. at 241; *Cincinnati*, 281 U.S. at 447. Authority to decide this question cannot be delegated solely to self-interested private parties such as Amtrak or Central Vermont.

In this case, the court of appeals was justifiably concerned that under the ICC's approach, Amtrak had virtually unchecked condemnation authority. The ICC itself indicated to the court that Amtrak could use

its authority as an "innovative financing device." The federal petitioners claim that the ICC can prevent Amtrak from "abusing" its authority under section 402(d), Gov't Br. 22-23, 35, but it is not clear what petitioners mean. If it is permissible for Amtrak to use its condemnation authority solely to raise capital or to obtain operating subsidies, Amtrak effectively may be able to sell its statutory condemnation authority to the highest bidder.[21] Even if the existing owner of a rail line is perfectly capable of upgrading and maintaining the line for passenger operations, the ICC's approach does not prevent Amtrak from forcing a transfer to a new owner who has "not contributed in money, services, negotiations, skill, forethought or otherwise to the development" of the line in question. *Thompson*, 300 U.S. at 78.[22]

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[21] The federal petitioners suggest that the ICC has inherent power to reject abusive applications under section 402(d) and that that power was made explicit when Congress conditioned reconveyances upon an ICC finding that the conveyance "further the purposes" of the RPSA. Gov't Br. 22 & n.17. But the ICC appears to believe that any condemnation scheme in which Amtrak has a "financial stake" and a "voice" is not abusive. Pet. App. 41a-42a. If that is the ICC's view—it made no finding otherwise—then the ICC's "inherent power" could not be relied upon to stop Amtrak from brokering its condemnation authority any time it detected the opportunity for a financial gain.

The federal petitioners also suggest that the ICC can prevent any abuse by exercising its authority under 49 U.S.C. § 11343 to review conveyances between railroads. Gov't Br. 23. But, as discussed earlier, that section is designed for *voluntary* conveyances between freight carriers. Under that provision, the ICC does not, and did not in this case, determine whether *condemnation* to force a transfer between freight carriers is justified.

[22] The court of appeals undoubtedly recognized that since Amtrak could receive below-cost trackage rights in transactions of

Ultimately, the court of appeals sought to interpret section 402(d) so as to ensure that any taking of private property by Amtrak would serve a "legitimate public purpose." It was partly for that reason that the court construed section 402 "to preclude Amtrak from resorting to its subsection (d) power to effect an outright change in ownership between competing railroads if it could instead achieve the objective necessary for passenger service by taking a lesser interest or using its subsection (a) power." Pet. App. 3a. By denying to Amtrak an unfettered "election of remedies," the court of appeals did not "nullify" the statutory provisions enacted by Congress, as petitioners now claim. Gov't. Br. 14. The court simply read into the statute the safeguards necessary to preserve its constitutionality. The extraordinary remedy of allowing Amtrak to condemn an existing railroad's

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this type, Amtrak was not in a position to make an objective decision on whether the taking was necessary in order to achieve a public purpose. Pet. App. 14a-16a.

At the very least, Amtrak's use of its eminent domain authority as an "innovative financing device" requires close scrutiny under the Fifth Amendment. As Professor Tribe has pointed out, the requirement that the government pay just compensation has indirectly served the function of assuring that particular takings do "indeed redound to the public benefit." L. Tribe, *supra*, § 9-2, at 589. "The public's willingness to pay, expressed through the legislative process," serves as indirect proof that "the public [has] in fact been the beneficiary of what otherwise appear[s] to be a forbidden transfer of property from one owner or class of owners to another." *Id.* Where a taking is financed wholly or partly by private interests, however, as in this case, there is a heightened risk that a "purely private taking" could occur, and a more probing review of the "public use" question is required. *See Gettysburg Elec. Ry.*, 160 U.S. at 681; *cf. Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403, 416-17 (1896).

property and transfer it to a third party was reserved for cases in which it is truly necessary to achieve a legitimate public purpose.[23]

Furthermore, the court of appeals implicitly recognized that a condemnation of a fee simple interest in existing rail property, followed by an immediate reconveyance to a competitor of the original owner, is rarely, if ever, necessary in order to achieve a legitimate public purpose. Pet. App. 19a-23a. Coercive

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[23] It has long been established that the Constitution prohibits any taking of property beyond what is needed for public purposes. As one leading commentator has stated:

> It necessarily follows from the principle that property cannot constitutionally be taken by eminent domain except for the public use, that *no more property can be taken by eminent domain than the public use requires*, since all that might be appropriated in excess of the public needs would not be taken for the public use. While considerable latitude is allowed in providing for the anticipated expansion of the requirements of the public, the rule itself is well established, and applies both to the amount of property to be acquired for public use and to the estate or interest acquired in such property. *If an easement will satisfy the public needs, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require . . . .*

J. Sackman, 3 *Nichols on Eminent Domain* § 9.2[2], at 9-16 to -18 (3d ed. 1991) (footnotes omitted) (emphasis added); *see also Warm Springs Irrigation Dist. v. Pacific Live Stock Co.*, 270 F. 560, 562 (9th Cir. 1921); *Silver Bow County v. Hafer*, 532 P.2d 691, 692 (Mont. 1975); *Wilson v. State*, 400 So. 2d 740 (La. App. 1981); *cf. Canal Auth. v. Miller*, 243 So. 2d 131, 133 (Fla. 1970). *See generally Cincinnati*, 281 U.S. at 446-49 (construing an Ohio eminent domain statute narrowly to avoid the serious constitutional issues that would be raised by a taking of excess property).

transfers of this type should be permitted only when the ICC finds that extraordinary circumstances preclude the use of lesser remedies such as an easement or a trackage rights agreement prescribed by the Commission.

In this case, Amtrak certainly alleged that B&M could not be trusted either to upgrade and maintain the line or to allow Amtrak to perform the necessary maintenance. The ICC described these allegations in its decisions, but all three judges on the court of appeals recognized that the Commission *itself* never made a specific determination that "the picture of an intransigent Boston & Maine Railroad drawn by Amtrak is in fact accurate." Pet. App. 4a. (concurring opinion of Judge Ginsburg). At oral argument, ICC counsel was asked specifically whether there was anything in the record to suggest that B&M would be incapable of upgrading and maintaining the track if Amtrak provided the necessary funds. Pet. App. 27a. ICC counsel answered this question in the negative, thereby conceding the most critical point in the case. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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